of each life tenant his share shall be divided among his heirs-at-law, and so on upon each successive death of the children of Nancy Gay. It contemplates that, at the death of Nancy Gay, each of her children is to have a separate and independent share, and it looks to separate and independent division of each share, at different times and to different persons. As each child dies his heirs are to take. . . . The intention of the testator cannot be carried out except by regarding this provision as separate and distinct devises to different classes, which take effect at different times, upon the respective deaths of the life tenants. The legal heirs of each child, upon his death, take his share of the estate, and *as the devise to the heirs takes effect at the death of their ancestor who had the life estate, it follows that in the case of all the children who were living at the death of the testator the devise over is not void for remoteness. In the case supposed of the after-born son, the devise over would be invalid, but this would not affect the distinct devises in favor of the heirs of his brothers and sisters; because the estates devised to them must vest within the period prescribed by law.* We are compelled to the conclusion that the concession of counsel, and the decision of the court in *Lovering* v. *Lovering*, *ubi supra*, to the effect that the gifts over to the heirs-at-law of the children of Nancy Gay were void for remoteness, were erroneous. *Catlin* v. *Brown*, 11 Hare, 372; *Griffith* v. *Pownall*, 13 Sim. 393; *Wilkinson* v. *Duncan*, 30 Beav. 111; *Storrs* v. *Benbow*, 3 De G., M. & G. 390; *Pearks* v. *Moseley*, 5 App. Cas. 714.

"The result of this is that the heirs-at-law of Ann L. Gay, are entitled, under the thirteenth clause of the will, to the property in which she had a life interest."

For a full discussion of the principle involved in this case, and of the authorities *pro* and *con*, see Gray on Perpetuities, pp. 260–267. Mr. Gray was of the counsel in this case, representing the heirs of Ann L. Gay.

RECENT CASES.

[These cases are selected from the current English and American decisions not yet regularly reported, for the purpose of giving the latest and most progressive work of the courts. No pains are spared in selecting *all* the cases, comparatively few in number, which disclose the general progress and tendencies of the law. When such cases are particularly suggestive, comments and references are added, if practicable.]

ASSUMPSIT — WORK AND LABOR BY WIFE FOR SUPPOSED HUSBAND — MISTAKE OF FACT. — A woman married a man and lived with him till his death. She afterwards learned that he had a former wife, still living, from whom he had not been divorced. *Held*, that she could not recover from his administrator for work and labor in keeping house for him during his life. *Cooper* v. *Cooper*, 17 N. E. Rep. 892 (Mass.); s. c. 16 Mass. Law Rep. (No. 35) 15.

This case is probably law. Compare cases where a negro has failed to recover the value of services rendered on the supposition that he was a slave. *Alfred* v. *Marquis of FitzJames*, Esp. 3; *Livingston* v. *Ackeston*, 5 Cowen, 531; *Negro Franklin* v. *Waters*, 8 Gill, 322. But see *contra*, *Negro Peter* v. *Steel*, 3 Yeates, 250; *Jarrat* v. *Jarrat*, 2 Gilman, 1, *semble*; *Kinney* v. *Cook*, 3 Seammon, 232, *semble*.

The argument in these cases appears to be that the service is gratuitous, and that there can be, consequently, no implied obligation to pay for it. But there seems to be no sound objection to treating them as cases of mistake of fact, where the plaintiff recovers the reasonable worth of something given or done because of a supposed legal obligation. However, it is not quite so clear that a

wife performs the services in discharge of a legal obligation, to her husband, as a sense of moral duty would probably induce her to perform them. Still it may be said that the services would never have been performed but for her supposed legal status as a wife.

BANKS AND BANKING — INSOLVENCY — DRAFT FOR COLLECTION.—A draft sent to a bank specially indorsed for collection was paid by the drawee, by check, which the bank collected through the clearing-house. A memorandum was placed with the bank's cash to indicate that the proceeds of the draft were the property of the sender. The bank suspended payment the next morning, and the receiver credited such proceeds to the sender of the draft on the books of the bank. *Held*, that the fund was not so mingled that it could not be traced and identified, and that the sender could recover the same. *First Nat. Bank of Montgomery* v. *Armstrong*, 36 Fed. Rep. 59 (Ohio).

For a further discussion of the doctrine above laid down see *First Nat. Bank of Circleville* v. *Bank of Monroe*, 33 Fed. Rep. 409 (N. Y.); and *In re Armstrong*, id. 405 (Ohio), digested in 2 HARV. L. REV. 48.

BILLS AND NOTES — PROTEST NOTICE WITHIN POST-OFFICE LIMITS. — An indorser of a note, whose residence and place of business is just outside of the corporate limits of the city where the note is protested, but within a short distance of the post-office of the city, is entitled to personal service of notice of protest; and a drop-letter sent through the post-office, there being no mail-carriers, is insufficient. *Brown* v. *Bank of Abingdon*, 7 S. E. Rep. 357 (Va.).

COMMON CARRIER — RAILWAY — EJECTION OF PASSENGER FOR FAILURE TO PRODUCE TICKET. — When a plaintiff, who has bought a ticket on defendants' railway, incorporating by reference to the defendants' by-laws a condition that every passenger shall deliver up his ticket when required or shall pay full fare, having lost his ticket, refuses to pay the fare, and is forcibly removed from the train by the defendants' servants, he cannot recover from the defendant in an action of assault. Such a ticket is not a revocable license to plaintiff to go on defendants' land, but is a contract by the defendants that on the plaintiff's paying for the ticket they will carry him between the specified points, and contains no condition, either express or implied in fact, giving defendants a right to eject him on failure to produce ticket. The plaintiff, having paid for his ticket, was lawfully on the premises of the defendants, whose only remedy against him was in action for breach of the conditional agreement to pay fare on failure to produce ticket. *Butler* v. *M. S. & L. R'y Co.*, 21 Q. B. D. 207; s. c. 38 Alb. L. J. 191.

It is, in general, held that one who attempts to ride on a train without having bought a proper ticket is a mere trespasser, and may be ejected by the company's servants on refusal to pay fare. *Wyman* v. *R'y Co.*, 25 N. W. Rep. 349 (Minn.); *Godfrey* v. *R'y Co*, 18 N. E. Rep. 61 (Ind.). But see *Hall* v. *R'y Co.*, 5 S. W. Rep. 623 (S. C.), which seems to be *contra*.

There seems to be no previous English authority on the precise point involved in *Butler* v. *R'y Co.*, as to the rights of a passenger who has bought a ticket but subsequently lost it. The tendency of American law, however, seems to be, in general, *contra*. *Townshend* v. *R'y Co.*, 56 N. Y. 295; *Shelton* v. *R'y Co.*, 29 Ohio St. 214, and *Jardine* v. *Crowell*, 14 Atl. Rep. 590 (N. J.). These cases are, however, imperfectly reported; two of them, at least, may, perhaps, be explained on the ground that a regulation of the company, which seems to be considered as an implied condition in the ticket, expressly required the conductor to eject a passenger who failed to produce ticket or pay fare. In the absence of any such express stipulation or regulation, the better view would seem to be that of the English case. A passenger who has lost his ticket cannot be considered a trespasser. The company contracted to carry him in consideration of his payment of money, and the promise to pay fare on failure to produce ticket when required; the consideration was not the doing of this act, but the promise to do it. Having thus given consideration for the company's agreement to carry him, he can insist upon its fulfilment, and is not a trespasser on their land; the breach of his conditional promise only gives the company a right of action against him.

See *Hall* v. *R'y Co.*, 15 Fed. Rep. 57, and note, for a discussion of the general subject of rights of passengers.

CONSTITUTIONAL LAW — COMPELLING DEFENDANT TO BE A WITNESS AGAINST HIMSELF.—To order the defendant in a trial for murder to stand up, during the trial, for identification by one of the witnesses, is not a violation of a constitutional provision that "no person shall be compelled in any criminal case to be a witness against himself." *People* v. *Goldenson*, 19 Pac. Rep. 161 (Cal.).

CONSTITUTIONAL LAW — POLICE POWER — PHYSICIAN'S LICENSE. — *Semble*, that an act of a State Legislature giving a State board of examiners the power to revoke a physician's license for "unprofessional conduct" is a valid and constitutional exercise of the police power of the State; and that the revocation of a physician's license from having advertised himself in a newspaper and printed pamphlet as a specialist in certain diseases is a valid and constitutional exercise of the discretion vested in the board of examiners. *Ex parte McNulty*, 19 Pac. Rep. 237 (Cal.).

Thornton, J., dissented from both of these propositions, saying, as to the exercise of discretion by the board of examiners: "As well might the board declare that wearing any other hat than one of a white color, by a physician, should be unprofessional conduct."

If the officers to whom is intrusted the execution of a valid law, under cover of that law, by a wrongful exercise of the discretion vested in them, do acts in violation of the Constitution, those acts come within the prohibition of the Constitution. *Yick Wo* v. *Hopkins*, 118 U. S. 356, and the other cases therein cited.

Quære, whether a law is rendered invalid *in toto* because it offers an opportunity for such an unconstitutional exercise of authority by the officers to whom its execution is intrusted. The better view would seem to be that if, on a fair construction of the terms of the law, it does not seem intended to authorize or secure such an unconstitutional exercise of authority, it shall be construed as only authorizing a valid exercise of discretion, and to be constitutional; and any officer making an invalid exercise of his discretion shall be held guilty of an unconstitutional exercise of authority, not warranted by the law under which he assumes to act.

CONSTITUTIONAL LAW — SUITS AGAINST STATES. — A suit in a Federal court by a railroad company chartered in one State to restrain railroad commissioners of another State from putting in force a schedule of rates, is not a suit against a State, within the meaning of the Eleventh Amendment to the Constitution of the United States, providing that the judicial power of the United States shall not extend to suits against one of the States by citizens of another State. "In these matters, although in a certain sense the State is interested, as it is in all matters affecting the welfare and happiness of her people, yet it is interested only in a general sense, and not in that direct pecuniary sense which makes it, in the language of the law, the real party in interest." *Chicago & N. W. R'y Co.* v. *Dey*, 35 Fed. Rep. 866 (Iowa).

Whether a State is the actual party defendant in a suit, within the meaning of the Eleventh Amendment to the Constitution of the United States, is to be determined by a consideration of the nature of the case as presented by the whole record, and not, in every case, by a reference to the nominal parties of the record. *In re Ayers*, 123 U. S. 443.

CONVERSION — MEASURE OF DAMAGES. — Defendant carelessly, but not wilfully, cut timber trees belonging to plaintiff. *Held*, that the measure of damages in an action of trover is the value of the trees immediately after they were severed from the realty. *Beede* v. *Lamprey*, 15 Atl. Rep. 133 (N. H.).

This case is a departure from the earlier authorities which hold that the measure of damages is to be estimated on the value of the property at the time of action brought, if its identity has been preserved. The authorities are reviewed in the opinion of the court.

CONVERSION — SALE OF PLEDGE BY MISTAKE — DAMAGES. — When the pledgee of stock, given as collateral security, under an honest mistake, sells the same, and applies the proceeds to the payment of the debt with interest, *held*, that the highest price of the stock between the time of conversion and of bringing action cannot enter into the determination of the damages, which must be limited to the highest price within a reasonable time after the plaintiff learned of the conversion, *minus* the amount of the debt and interest. *Wright* v. *Bank of the Metropolis*, 18 N. E. Rep. 79 (N. Y.).

The principle that a plaintiff must so act as to make his damages as small as he reasonably can was applied in this case. It had already been decided in *Baker* v. *Drake*, 53 N. Y. 211, that, when the plaintiff was suing for the conversion of stock for which he had paid the broker but a small percentage of the value as a "margin," a duty rested on him to purchase in the market within a reasonable time after he knew of the conversion, in order to diminish his loss. The court intimated that no such duty would rest on a plaintiff who was complete owner of the stock, thus indicating a distinction between cases where the

plaintiff is merely speculating and those where he intends really to hold the stock as owner.

The case above repudiates that distinction. It is an illustration of the modern tendency to require a plaintiff so to act as to make his damages as small as he reasonably can, both in actions of tort (*Hogle* v. *R. R. Co.*, 28 Hun, 363) and of contract (*Parsons* v. *Sutton*, 66 N. Y. 92). See 1 Sedgwick on Damages (7th ed.), 166, *note*.

EVIDENCE — PRESUMPTION OF DEATH — SEVEN YEARS' ABSENCE. — Although a presumption of death arises at the end of a seven years' absence, there is no presumption of life during that period, or of the time of death; the time of death, when material, is a fact to be established by evidence. *Whitely* v. *Equitable Life Assur. Soc. of U. S.*, 39 N. W. Rep. 369 (Wis.).

For other cases overthrowing the old doctrine that there is a presumption of life until the end of the seven years, see *Bailey* v. *Briggs*, 97 U. S. 628, at 634, and note in Best's Evidence (Chamberlayne's ed.), p. 299.

HUSBAND AND WIFE — COMMUNITY PROPERTY — MORTGAGE AND RECONVEYANCE. — Where community property conveyed to secure the husband's debt is, upon payment of the debt, reconveyed to the wife upon a nominal consideration, it again becomes community property, as it was originally. *Ballew* v. *Casey*, 9 S W. Rep. 189 (Tex.).

INSURANCE — DURATION OF "BINDING RECEIPT." — The plaintiff applied for insurance, and the agent, unable to determine what should be the premium until the property was rated, gave a "binding receipt," which certified that the company would hold good a specified amount of insurance until the policy could be delivered. No premium was ever paid, and nothing more was done about the matter until about ten months afterward, when a loss occurred. *Held*, that the "binding receipt" was a mere preliminary contract, and continued only for a reasonable time; and that ten months was not a reasonable time in case of a contract for one year. *Coe* v. *Washington F. & M. Ins. Co.*, 17 Ins. L. J. 717 (N. J. Circuit Court.)

LANDLORD AND TENANT — COVENANT AGAINST ANNOYANCE AND NUISANCE — HOSPITAL. — Although the use of leased premises as a hospital for the cure of diseases of the ear, etc., in which known infectious diseases are not treated, is not a breach of a covenant not to use the premises to the "nuisance" of adjoining residents, such a use not being a technical "nuisance," yet it is a breach of a covenant not to use the premises to the "annoyance" of adjoining residents, being such a use of the premises as seriously abridges their ordinary comfort of existence, and sensibly increases the possible danger from infection. *Heatley* v. *Benham*, 59 L. T. Rep. (N. S.) 25; S. C. 38 Alb. L. J. 321.

MISREPRESENTATION — ACTION OF DECEIT — LIABILITY OF DIRECTORS FOR MISSTATEMENT IN PROSPECTUS — MEASURE OF DAMAGES. — Directors of a tramway company, who issue a prospectus stating that under its act of incorporation the company has the right to use steam-power instead of horse-power, when in fact the company has only the right to use steam-power with the consent of the board of trade, which consent was afterwards refused, are liable, in an action of deceit, to a stockholder to whom this misstatement was a material inducement for taking shares in the company, to the extent of the actual loss which he sustained through depreciation in the value of the shares subsequent to his purchase. Cotton, L. J.: "Where a man makes a statement, to be acted upon by others, which is false, and which is known by him to be false, or is made by him recklessly or without caring whether it is true or false — that is, without any reasonable ground for believing it to be true — he is liable in an action of deceit at the suit of any one to whom it was addressed, or of any one of the class to whom it was addressed, and who was materially induced by the misstatements to do an act to his prejudice." *Peek* v. *Derry*, 59 L. T. Rep. (N. S.) 78; S. C. 38 Alb. L. J. 273.

This is a strong and important decision, insisting more strongly than has ever been done before on the necessity of strictest honesty in commercial dealings. It was also held in this case that a director who was not present at the meeting at which the issuing of the prospectus was authorized, but who afterwards received and circulated some copies of it, had adopted it, and was liable to the stockholder, although the copy seen by the stockholder had not been supplied by him.

NEGLIGENCE — DAMAGES — KILLING OF MINOR CHILD. — A child four and one-half years old was run over and killed through the negligence of the driver of a loaded wagon. *Held*, that the father could recover all the probable, or even

possible, benefits which might have resulted to him from the whole future life of the child, modified by all the chances of failure and misfortune. *Birkett* v. *Knickerbocker Ice Co.*, 18 N. E. Rep. 108 (N. Y.).

The rule of damages is different in some jurisdictions. In Michigan, for example (*Cooper* v. *L. S. & M. S. R'y Co.*, 33 N. W. Rep. 306), the rule above given is severely criticised, and the damages are limited to the loss of probable services during the minority of the child, *minus* the probable expense to the parent. "Anything further is incapable of pecuniary estimate." So in Texas (*Brunswig* v. *White*, 8 S. W. Rep. 85) and in Pennsylvania (*Penn. College* v. *Nee*, 13 Atl. Rep. 841).

It should be noticed that the right to damages in these cases is statutory, and the measure is not exactly the same as in common-law actions of tort. While not mere injury to the feelings, but only pecuniary loss, actual or expectant, can be considered, still wide latitude is given under the statutes; but the New York case would seem to go too far. See Cooley on Torts, p. 270.

NEGLIGENCE — IMPUTED — DRIVER AND PASSENGER. — Plaintiff, while riding in a vehicle upon invitation of the owner, sustained an injury occasioned by a defect in the highway. *Held*, that the negligence of the driver which contributed to the injury could not be imputed to plaintiff. *Nisbet* v. *Town of Garner*, 39 N. W. Rep. 516 (Iowa).

In confirmation of this doctrine see the late English case of *Mills* v. *Armstrong*, 57 L. J. Rep. Q. B. 65, which overrules the well-known case of *Thorogood* v. *Bryan*, 8 C. B. 115. See also note, 2 HARV. L. REV. 140.

NEGLIGENCE — IMPUTED — PARENT AND CHILD. — An infant five years of age is not precluded from recovering damages for an injury which might have been avoided by the exercise of due care on the part of his parents. *Bisaillon* v. *Blood*, 15 Atl. Rep. 147 (N. H.).

The old doctrine imputing the negligence of a parent to the child is not fully sustained by the latest authorities. Thus it is said in *Huff* v. *Ames*, 19 N. W. Rep. 623, that "in an action for damages by an infant . . . the negligence of the parent or guardian is not to be considered or imputed to the infant." *Railway Co.* v. *Schuster*, 6 Atl. Rep. 269 (Pa.), *accord*. But see *Fitzgerald* v. *Railway Co.*, 13 N. W. Rep. 168 (Me.), and *Slater* v. *Railway Co.*, 32 N. W. Rep. 264 (Iowa), in which the old rule of imputed negligence is followed.

PLEDGE — SUBSEQUENT DELIVERY OF POSSESSION. — Where the borrower of money agrees to deliver to the lender, at a future time, certain goods as security therefor, on the subsequent delivery of the goods in pursuance of the contract the same legal results follow as if the goods had been delivered when the money was lent, and the "special property" in the goods passes at once to the lender. Although delivery of the goods is essential to the contract of pledge, that delivery need not be contemporaneous with the advance of the money. *Hilton* v. *Tucker*, 59 L. T. Rep. (N. S.) 172; S. C. 38 Alb. L. J. 333.

TELEGRAPH COMPANIES — LIABILITY FOR ACTS OF AGENT — FRAUDULENT MESSAGE. — Plaintiff, in response to a despatch which was sent over defendant's wires, and which apparently came from parties to whom he was in the habit of forwarding money, though, in fact, it was prepared and sent by the agent of defendant, forwarded to the supposed sender of the telegram fifteen hundred dollars in currency by the American Express Company. This money was intercepted by defendant's agent who sent the telegram, and who was also agent of the express company. *Held*, that the transmission of the forged despatch was the proximate cause of plaintiff's loss, and that the telegraph company was liable for the act of its servant. *McCord* v. *Western Union Tel. Co.*, 39 N. W. Rep. 315 (Minn.).

This seems to be a strange application of the doctrine of *respondeat superior*. The telegraph agent, in preparing and sending the false despatch, certainly did not act in the capacity of agent, but wholly on his own account.

VENDOR'S LIEN — ASSIGNMENT OF NOTE AS COLLATERAL. — The personal lien existing in favor of the vendor of land for a note given for unpaid purchase-money is not lost by the mere assignment of the note as collateral security. *Cate* v. *Cate*, 9 S. W. Rep. 231 (Tenn.).

By the English authorities, which hold that the equity is not one personal to the vendor, the lien seems to be assignable (2 Dart's V. & P. 5th ed. 732; *Dryden* v. *Frost*, 3 Mylne & C. 670). The opposite view prevails generally in this country, but the above exception, which is rather apparent than real, has been made before in other States (Jones on Liens, § 1096).